

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GARY PHLEGER)	
Claimant)	
VS.)	
)	Docket No. 239,217
HARDING GLASS)	
Respondent)	
AND)	
)	
LEGION INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the December 7, 1999, Award of Administrative Law Judge Bruce E. Moore. In the Award, claimant was granted a 34.5 percent work disability for injuries suffered on October 14, 1997, to his knees. Oral argument before the Board was held on May 24, 2000.

APPEARANCES

Claimant appeared by his attorney, Patrik W. Neustrom of Salina, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael T. Halloran of Leawood, Kansas.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are adopted by the Appeals Board for the purposes of this award. In addition, the parties agreed at oral argument that the 27 percent post-injury wage loss listed in the Award is appropriate and is not an issue. Claimant further stipulated that the 1 percent deduction from the award by the Administrative Law Judge for claimant's preexisting impairment to his lower extremity is proper and is not in dispute before the Appeals Board. Therefore,

the only issue for consideration by the Appeals Board is claimant's loss of ability to perform tasks under K.S.A. 1997 Supp. 44-510e.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury on October 14, 1997, when he fell from a six-foot ladder, injuring both knees. He was referred for treatment to David A. Peterson, M.D., orthopedic surgeon, and underwent a right partial medial and lateral meniscectomy on November 19, 1997. On December 10, 1997, Dr. Peterson performed a left partial medial meniscectomy, partial lateral meniscectomy and chondroplasty.

Claimant's subsequent 4 percent whole person functional impairment was stipulated to by the parties at the time of regular hearing.

Claimant returned to work with the respondent after the surgeries, but was only able to work a portion of the time, being paid temporary partial disability compensation through his last day of work, March 3, 1998.

Claimant later obtained employment with Ovation, resulting in the stipulated 27 percent wage loss.

A task list was prepared by vocational expert James Molski. While Mr. Molski did not testify in this matter, the task list prepared by his office was utilized by claimant and by the only doctor to testify, Dr. Peterson. Both claimant and Dr. Peterson identified certain of the eighteen tasks listed by Mr. Molski which claimant could not perform. Originally, claimant testified to being able to perform all but four of the tasks on the list. However, when claimant returned to work with respondent and attempted to perform those tasks, he encountered four additional tasks which required occasional lifting of up to 75 pounds. Claimant was unable to perform those tasks completely and, thereafter, testified that he was unable to perform eight of eighteen tasks, for a 44 percent task loss. Dr. Peterson agreed with claimant's assessment of the tasks he could and could not do.

Respondent objects to this task loss, contending that the task list prepared by Mr. Molski, testified to by claimant and utilized by Dr. Peterson should be modified. Respondent requests that the four tasks claimant testified to being unable to perform should be split into eight tasks. Claimant would be able to perform the four tasks with weight lifting requirements of up to 40 pounds pursuant to Dr. Peterson's restrictions.

Claimant would be unable to perform the four tasks which require the additional lifting of up to 75 pounds. However, neither claimant nor Dr. Peterson testified that those tasks should be bifurcated based upon how much weight claimant was required to lift.

Respondent does not dispute the claimant's inability to lift the heavier weights of up to 75 pounds, but merely argues that the four tasks should be modified in the above fashion.

The Appeals Board rejects respondent's argument. K.S.A. 1997 Supp. 44-510e requires that the task opinion be presented in the opinion of the physician. Dr. Peterson had the opportunity to review the task list prepared by Mr. Molski and testified to by claimant. Dr. Peterson restricted claimant from lifting over 40 pounds and carrying over 50 pounds. The tasks specifically identified in Mr. Molski's list, which required claimant to lift up to 75 pounds, violated those restrictions. Dr. Peterson did not testify that the lifting limitations on those tasks would or should create separate tasks. Had there been testimony in the record that those tasks could have been separated in some fashion, based upon the lifting required, then the Board agrees that, based upon that evidence, those four tasks could have been enlarged. However, that evidence was not presented in the record, and the Board will not speculate with the task analysis. The Appeals Board, therefore, finds that the eighteen tasks listed by Mr. Molski and testified to by both claimant and Dr. Peterson are appropriate, and claimant is limited by both his physical disabilities and the limitations set upon him by Dr. Peterson from doing eight of those eighteen tasks, resulting in a 44 percent task loss.

The Appeals Board, therefore, finds that the Award of the Administrative Law Judge, which assessed claimant a 27 percent loss of wage earning ability and a 44 percent loss of task performing abilities, resulting in a 35.5 percent work disability, should be affirmed. As noted above, claimant does not dispute the deduction of the 1 percent preexisting functional impairment, resulting in an overall work disability of 34.5 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated December 7, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrik W. Neustrom, Salina, KS
 Michael T. Halloran, Leawood, KS
 Bruce E. Moore, Administrative Law Judge
 Philip S. Harness, Director